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No. 01-1431

Supreme Court, U.S.
FILED
APR 24 2002
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In The

Supreme Court of the United States

BRENDA G. TAYLOR,

Petitioner,

vs.

JAMES W. HODGES, individually and in his official capacity as principal, GENE BUINGER, individually and in his official capacity as superintendent, and BIBB COUNTY SCHOOL DISTRICT,

Respondents.

On Petition For Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

RESPONDENTS GENE BUINGER AND BIBB COUNTY SCHOOL DISTRICT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court's charge to the jury on the issue of sexual harassment was reversible error.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the writ.

STATEMENT OF THE CASE

This case was tried to a jury over a nine-day period resulting in a verdict and judgment for the Respondents. (R4-188, 189). Petitioner appealed several issues to the Eleventh Circuit Court of Appeals which unanimously affirmed the verdict and judgment of the district court. A Petition for Rehearing En Banc was denied. Petitioner then filed a Petition for Writ of Certiorari.

The Question Presented alleges reversible error with respect to the district court's charge on sexual harassment.

Petitioner misstates the charge that was given to the jury and omits several portions that were given. Below is a transcript of the charge that was given with the omitted portions in bold:

> **The plaintiff in this case claims that the defendant, Bibb County School District, intentionally discriminated against her because of her sex. The defendant denies this charge. The plaintiff in this case claims that she has been the subject of sexual harassment by her employer. In its broadest sense, sexual harassment is any or unwelcome sexual conduct that alters the term or condition of employment.**
>
> **The defendants deny this charge. It is your responsibility to decide whether the plaintiff**

has proved her claim against the defendants by a preponderance of the evidence.

The defendant, Bibb County School District, the employer, is responsible or liable for the actions of plaintiff's supervisor in plaintiff's claim of sexual harassment, if the plaintiff proved by a preponderance of the evidence that, first, Dr. Hodges, the plaintiff's supervisor, made intentional sexual advances to the plaintiff. And, next, that the sexual advances were unwelcomed by the plaintiff. Third, the acceptance or rejection of the sexual advances were an express or implied condition or the receipt of a job benefit or the imposition of a tangible job detriment. And fourth, the plaintiff's reaction to these supervisor's advances, in fact, affected a tangible aspect of her employment.

The plaintiff alleges that she has been forced into a hostile work environment because of sexual harassment. To prevail on such a theory, the plaintiff need not – excuse me. The plaintiff does not need to demonstrate that any substantial job benefits either were conditioned on submitting to hostile sexual harassment or were denied because of refusing to give into such conduct. Rather, to establish a claim of hostile work environment, sexual harassment, the plaintiff must prove by a preponderance of the evidence that her workplace was permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of her employment or create an abusive working environment.

In evaluating hostile work environment sexual harassment claims you must consider the following facts, factors: One, the total

physical environment of the plaintiff's work area. Two, the degree and type of obscenity that filled the environment of the workplace, both before and after the plaintiff arrived. Three, the reasonable expectation of the plaintiff upon entering the environment. Four, the nature of the unwelcome sexual acts or words. Five, the frequency of the offensive encounters. Six, the severity of the conduct. Seven, the context in which the sexual harassment occurred. Eight, whether the conduct was unwelcome. Nine, the effect on plaintiff's psychological well-being. Ten, whether the conduct was physically threatening. Eleven, whether it was merely an offensive utterance, and, twelve, whether it unreasonably interfered with the plaintiff's work performance.

As noted above, the harassment must be unwelcome and hostile. In determining whether the conduct was unwelcome you should consider all of the evidence and base your decision on it. In determining whether the conduct is hostile, the harassment to which the plaintiff was subjected must be sufficiently severe or extensive to alter the conditions of the plaintiff's employment and to create an abusive work environment.

The more severe the conduct the less extensive it must be for you to find that it is hostile. In determining that it is hostile you should consider, one, whether the conduct was verbal is, physical or both. Two, whether the conduct occurred one time or repeatedly. Three, whether the conduct was plainly offensive. Four, whether the alleged harasser was a coworker or a supervisor. Five, whether others

joined in the harassment and, six, whether the harassment was directed at more than one person.

In determining whether a hostile work environment existed you must consider the evidence from the perspective of a reasonable person. This is an objective standard and you must look at the evidence from the perspective of a reasonable person's reaction to a similar environment under similar circumstances.

You cannot view the evidence from the perspective of an overly sensitive person. Rather, you must evaluate the total circumstances and determine whether the alleged harassing behavior could be objectively classified as a kind of behavior that would seriously affect the psychological well-being of a reasonable person.

After deciding whether a reasonable person would classify the defendant's behavior as creating a hostile work environment, you must consider the perspective of the plaintiff. If the plaintiff does not subjectively perceive the environment to be hostile and abusive, the conduct has not actually altered the conditions of her employment, and there is not a hostile work environment.

If you find that the plaintiff has proved all of the necessary elements of her hostile work environment sexual harassment claim, then the defendant, Bibb County School District, is liable to the plaintiff, unless you find that said employer proved by a preponderance of the evidence that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior. And that the plaintiff,

> employee, unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

(1st Supp. Vol. 2-213-126-130).

This charge was taken from Devitt, Black, and Wolf, *Federal Jury Practice and Instructions* §§ 104.01 and 104.02 (Supp. 1997) and the ABA Section of Litigation, Model Jury Instructions for Employment Litigation, § 1.04[2]. The charge is an accurate and complete statement of the law.

Over the nine-day jury trial, Petitioner had the opportunity to fully and completely present her case. At the same time, Respondents put forth witnesses who testified at length about Petitioner's lack of credibility, her extreme misconduct at work, and the legitimate reasons for her termination. After hearing all of the evidence, the jury correctly came back with a verdict in favor of the Respondents.

ARGUMENT

The charge at issue is an accurate statement of the law and is not in conflict with this Court's decisions. Moreover, the issue is not of significant importance to warrant review by this Court.

Relying on *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), for the proposition that Title VII sexual harassment must involve discrimination "based on sex,"

Petitioner alleges error by the District Court for not informing the jury that the claim of sexual harassment involved discrimination based on sex. However, the Petition fails to include the sentence in the charge that states, "[t]he Plaintiff in this case claims that the Defendant Bibb County School District intentionally discriminated against her *because of her sex.*" (1st Supp. Vol. 2-213-126) (emphasis added). This contention is totally without merit.

Petitioner next cites *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1982), for the proposition that in order to be actionable, the sexual advances must be "unwelcome." Again, Petitioner fails to include in her Petition the portions of the charge which state that sexual advances must be unwelcome:

> In its broadest sense, sexual harassment is any or *unwelcome* sexual conduct that alters the term or condition of employment.
>
> The defendant, Bibb County School District, the employer, is responsible or liable for the actions of plaintiff's supervisor in plaintiff's claim of sexual harassment, if . . . the sexual advances were *unwelcomed* by the plaintiff.
>
> In evaluating hostile work environment sexual harassment claims you must consider the following facts, factors: . . . Eight, *whether the conduct was unwelcome.*
>
> As noted above, the harassment must be *unwelcome* and hostile. In determining whether the conduct was *unwelcome* you should consider all of the evidence and base your decision on it.

(1st Supp. Vol. 2-213-128) (emphasis added).

Clearly the district court adequately informed the jury of the requirement that the sexual harassment must be unwelcome by the Title VII plaintiff.

Finally, Petitioner cites *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and raises for the first time the argument that the district court should not have charged the jury on the affirmative defense available to an employer defending against a vicarious liability hostile environment sexual harassment claim. The facts simply do not support Petitioner's contention.

Petitioner claims that the offending supervisor took a tangible employment action against her, and thus the affirmative defense set out in *Faragher* should not have been charged. However, the evidence at trial showed that it was the superintendent, not the school principal, who decided to terminate the Petitioner. Thus, whether a tangible employment action had been taken against her by her allegedly sexually harassing supervisor was a disputed fact that went to the jury and was resolved in Respondent's favor.

Even if Petitioner could demonstrate error in the instructions given to the jury, she cannot show that such an error was so substantial that it unduly confused the jury and caused them to find against her. Petitioner has a steep mountain to climb to reverse the district court on an improper jury charge because appellate courts apply "a deferential standard of review to a district court's jury instructions." *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1543 (11th Cir. 1996). An appellate court's review of "a trial court's jury instructions is limited." *Jennings v. BIC Corp.*, 181 F.3d 1250, 1254 (11th Cir. 1999).

In *Carter v. DecisionOne Corp.*, 122 F.3d 997, 1005 (11th Cir. 1997), the Eleventh Circuit stated the rule for reviewing jury charges: "The trial judge is given wide discretion as to the style and wording employed in the instructions so long as they accurately reflect the law. Under this standard, we examine whether the jury charges, considered as a whole, sufficiently instructed the jury so that the jurors understood the issues and were not misled. We will reverse the district court because of an erroneous instruction only if we are left with a substantial and eradicable doubt as to whether the jury was properly guided in its deliberations." (Internal citations omitted) (Emphasis supplied).

Jury charges can be technically imperfect but still not require reversal. *Alexander v. Fulton County*, 207 F.3d 1303, 1332 (11th Cir. 2000). Even if jury instructions contain law that should not be charged, there will be no reversible error if the "charge taken as a whole did not unduly confuse the jury . . . ." *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1322 (11th Cir. 1999). Likewise, isolated clauses may be incorrect, ambiguous, incomplete, or otherwise subject to criticism, but the case will not be reversed if the charge, taken as a whole, properly expressed the applicable law. *Busbee v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. 1991).

Prior to giving the charge, the district court observed that "[we] are encouraged by the appellate courts to use standard charges." (1st Supp. Vol. 2-213-100). The charge on Title VII and quid pro quo sex harassment came from Devitt, Blackmar and Wolf, *Federal Jury Practice and Instructions*. The charge on Title VII and hostile environment sex harassment was taken from the ABA Section of

Litigation, Model Jury Instructions for Employment Litigation. The charges given are tried and true, and are indisputably an accurate statement of the law as applied to the evidence presented to the jury. No error occurred.

CONCLUSION

Respondents respectfully request that this Court deny the writ as it is clear that no error occurred in the charge that was given to the jury and the petition is without merit.

Respectfully submitted,

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